

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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| In re: |) | Chapter 11 |
| |) | |
| TW, INC., |) | Bankruptcy No. 03-10785 (MFW) |
| |) | |
| Debtor, |) | |
| |) | |
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| TW, INC., |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | Civ. No. 03-533-SLR |
| |) | |
| MARIE ANGELASTRO and |) | |
| GEORGE ANGELASTRO, |) | |
| |) | |
| Appellees. |) | |

MEMORANDUM ORDER

At Wilmington, this 14th day of January, 2004, having reviewed the appeal of appellant-debtor from the April 10, 2003 decision of the bankruptcy court in the above captioned case, and the memoranda submitted in connection therewith;

IT IS ORDERED that the decision of the bankruptcy court is affirmed and the appeal denied for the reasons that follow:

1. On March 14, 2003 (the "Petition Date"), debtor-appellant filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. On the Petition Date, debtor-appellant filed a lease rejection motion, pursuant to 11 U.S.C. § 365, to reject certain nonresidential leases. Among the leases to be rejected was a lease ("the Lease") for a store located at 4201-

4209 Avenue U, Brooklyn, New York 11234 (the "Premises"), of which appellees were the lessors. The lease rejection motion sought retroactive rejection of the Lease so that the effective date of the rejection would be the Petition Date. The motion was served by mail on appellees on March 13, 2003. On April 3, 2003, the lessors filed a timely motion objecting only to the retroactive application of the rejection. A bankruptcy court hearing was held on April 7, 2003, and an order was entered on April 10, 2003 granting the appellant-debtor's motion to reject the lease, but denying its request for retroactive effect.

2. Debtor-appellant filed the present appeal on April 21, 2003, and the court has jurisdiction pursuant to 28 U.S.C. § 158(a). The parties do not dispute the essential facts in this case, namely that debtor-appellant closed its retail operation at the Premises prior to the Petition Date; appellees had notice of debtor's intention to reject the Lease; and that debtor-appellant did not return the keys to the Premises to appellees prior to the April 7, 2003 hearing. The debtor-appellant admitted that it was obligated to return the keys, that it mistakenly did not do so and, further, that it innocently misrepresented these facts in its rejection motion. (D.I. 9, ex. 4 at 19-20)

3. The end effect of this decision on the estate is that the appellees will have an administrative claim for both March and April rent, rather than simply just for March. At the

hearing, the creditors' committee raised the concern that due to the timing of the hearing in early April, appellees would receive a windfall by being entitled to administrative rent for the entire month of April. (Id. at 29-30) The bankruptcy court noted that concern and indicated that it would address that concern when claims were filed, but that the rejection date, as to the Premises, would not be retroactive to the Petition Date. (Id. at 30)

4. Debtor-appellant contends that the bankruptcy court abused its discretion by denying debtor-appellant's request for retroactive application of the rejection.

5. In undertaking a review of the issues on appeal, the court applies a clearly erroneous standard to the bankruptcy court's findings of fact and a plenary standard to that court's legal conclusions. See Am. Flint Glass Workers Union v. Anchor Resolution Corp., 197 F.3d 76, 80 (3d Cir. 1999). With mixed questions of law and fact, the court must accept the bankruptcy court's "finding of historical or narrative facts unless clearly erroneous, but exercises 'plenary review of the [bankruptcy] court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.'" Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 642 (3d Cir. 1991) (citing Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 101-02 (3d Cir. 1981)). The district court's

appellate responsibilities are further informed by the directive of the United States Court of Appeals for the Third Circuit, which effectively reviews on a de novo basis bankruptcy court opinions. In re Hechinger, 298 F.3d 219, 224 (3d Cir. 2002); In re Telegroup, 281 F.3d 133, 136 (3d Cir. 2002). Bankruptcy court decisions involving the exercise of discretion are reviewed for an abuse of discretion. See In re Vertientes, Ltd., 845 F.2d 57, 59 (3d Cir. 1988). See also In re Thinking Machines Corp., 67 F.3d 1021, 1028 (1st Cir. 1995) (“[A]ppeals from a bankruptcy court's disposition of a request for retroactive relief will be reviewed only for abuse of discretion.”).

6. A bankruptcy court may “when principles of equity so dictate ... approve a rejection of a nonresidential lease pursuant to section 365(a) retroactive to the motion filing date.” In re Thinking Machines, 67 F.3d at 1028. The power to grant relief retroactively is derived from the bankruptcy’s equitable powers to insure a fair outcome. Id.

7. An order granting relief nunc pro tunc is not a remedy that should be given as a matter of course, but only after a balancing of the equities in a particular case. It is the burden of the moving party to show that relief, of this character, is appropriate. In the present case, the bankruptcy court placed emphasis on the fact that possession of the Premises was not properly surrendered and that fault, in this regard, indisputably

rested with the debtor. Unlike circumstances where possession has been surrendered prior to the petition date, a landlord without actual possession may face a greater risk and greater uncertainty as to whether the lease will ultimately be rejected. Consequently, the court concluded that debtor-appellant failed to demonstrate that it was entitled to retroactive relief.

8. This court finds that the bankruptcy court's decision to deny the request for retroactive relief does not constitute an abuse of its discretion.

Sue L. Robinson
United States District Judge